Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Communications, Energy and Paperworkers Union of Canada,

applicant,

and

Exploration Production Inc.; CTV Specialty Television Enterprises Inc.; The Sports Network Inc. (TSN),

employers.

Board Files: 26436-C and 26437-C
Neutral Citation: 2011 CIRB **583**
April 27, 2011

A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Judith F. MacPherson, Q.C., Vice-Chairperson, and Messrs. Patrick J. Heinke and Norman Rivard, Members, considered the above-noted applications. Case management conferences were held on March 10, 2008 and March 9, 2009; a pre-hearing conference was held on April 7, 2008; and hearings were held on July 22 to 24, December 1 to 4, 2008, January 20 and 22 to 23, February 18 to 19, April 14 and 17, May 1, August 10 to 12 and September 28, 2009, in Toronto, Ontario.

Appearances

Messrs. J. James Nyman and Jesse Kugler, for the applicant;

Mr. John-Paul Alexandrowicz, for the respondents.

These reasons for decision were written by Ms. Judith F. MacPherson, Q.C., Vice-Chairperson.

I–Introduction

[1] The Communications, Energy and Paperworkers Union of Canada (the union) filed an application for certification, pursuant to section 24 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*), to represent employees of Exploration Production Inc. (EPI), as well as an application under sections 18 and 35 of the *Code*, to declare EPI, CTV Specialty Television Enterprises Inc. (Specialty) and The Sports Network Inc. (TSN) (collectively "the respondents") a single employer and to review the bargaining unit comprised of employees of Specialty, TSN, and CFTO-TV, a division of CTV Television Inc. (CFTO-TV). The Board consolidated the matters pursuant to section 20 of the *Canada Industrial Relations Board Regulations, 2001*, given the overlapping issue.

[2] The respondents raised the preliminary objection that EPI's labour relations do not fall within federal jurisdiction and are not subject to the application of the *Code*. The Board agreed to the parties' request to firstly determine this issue. The parties agreed the respondents would present their evidence first. This decision deals solely with the issue of whether EPI's operation is subject to federal jurisdiction.

[3] The following persons testified: on behalf of the respondents, Mr. Paul Lewis, President and General Manager of EPI and 2953285 Canada Inc., operating as Discovery Canada (Discovery Canada), Mr. Anthony Leadman, Head, Worldwide Distribution for EPI, CTV and Discovery Canada, Mr. Andrew Burnstein, President of Castlewood Productions Inc. (Castlewood) and formerly a director of EPI, Ms. Deborah James, Director of Business and Legal Affairs for CTV Inc. (CTV) and formerly EPI's Director of Business Operations, and Mr. Paul Patenaude, Specialty's Director of Post-Production; on behalf of the union, Mr. Bennett Schaub, Producer for the *Daily Planet* program, and Mr. Ralph Cole, Editor for Specialty. The Board notes that a Confidentiality and Disclosure Order was granted in this matter, which has been taken into account in the provision of these reasons.

II–Background and Facts

[4] The Board has fully reviewed the voluminous information provided by the parties, including the agreed statement of facts, the written submissions and documentation, along with the evidence adduced at the hearing. For the purpose of this decision, the Board will only refer to the evidence which it considers relevant to the determination of this matter.

[5] EPI is a company that produces and distributes factual content, primarily for television documentaries, focussing mostly on science, nature and technology. EPI is wholly owned by Discovery Canada, which is a Canadian broadcaster. Discovery Canada, is in turn 80% owned by Specialty.

[6] In 1993, EPI was federally incorporated as 2967839 Canada Inc. and in 1996, the name was changed to EPI. EPI has produced programming for Canadian and international companies, primarily for Discovery Canada, as well as other broadcasters and private corporations, government agencies and educational distributors. Beginning in 1996, EPI produced *Go For It*, a series of over 50 one-hour programs. By 2007, EPI had produced approximately 100 productions, some of which comprised a number of television series.

[7] The Canadian Audio-Visual Certification Office (CAVCO) has consistently determined that EPI's productions are eligible for the Canadian Film or Video Production Tax Credit (CAVCO tax credits), a form of labour tax credit under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The Canadian Film Development Corporation (Telefilm Canada) has also done so and certified EPI as a Canadian production company.

[8] To qualify for CAVCO tax credits, a production must at least have: (1) eligible content (talk shows, game shows and news shows do not qualify), (2) 100% ownership and control by a Canadian production company, (3) 75% of production and post-production expenses expended in Canada, (4) a Canadian producer, controlling creative and financial aspects, e.g. six of ten key creative personnel, and (5) a commitment from a Canadian broadcaster to air it within two years. EPI satisfies some of the qualifications for CAVCO tax credits by the payments it makes to Specialty for services such as post-production work. Broadcasters do not qualify for CAVCO tax credits.

[9] EPI earns revenue from licensing fees charged for the right to broadcast or otherwise use its productions. It generally retains the copyright to its productions, to further license them, in their original form or by reversioning them for other clients. It also earns revenue from the CAVCO tax credits.

[10] EPI's Website, www.exploration.ca, displays text and some of its content, consisting of still and moving images, sound and video. The Website contains information about EPI's various productions and permits the viewing of some of its products. These promotional reels primarily show five-minute clips of EPI's productions, although they also contain some full length episodes. In order to view anything other than what is on the Website, a request must be made to obtain an electronic key and password, that is, a "pass." It does not link to The Discovery Channel's (Discovery) or any other broadcaster's website.

[11] EPI's Website predominantly displays EPI's logo, but those of Discovery and CTV are also shown. The Website states that EPI is a wholly-owned subsidiary of Discovery Channel Canada and a joint venture between CTV Specialty Television Inc. and Discovery Communications, LLC. It also states that EPI has over 1000 hours of TV programming and 150 hours in High-Definition (HD).

[12] EPI is not subject to regulation under the *Broadcasting Act* and does not require a CRTC broadcasting licence. It is admitted that EPI does not broadcast through traditional cable distribution networks.

[13] CTV owns 3578704 Canada Inc. which owns 70.08% of CTV Specialty Television Inc. (CTV Specialty), with 29.92% being owned by 3167488 Canada Inc. (ESPN Holdco), which is unrelated to the CTV group. CTV Specialty owns 100% of Specialty. CTV is 100% owned by CTVglobemedia Inc., which is owned by Torstar Corporation (20%), BCE Inc.(15%), Thomson Corporation (40%) and Ontario Teachers' Pension Plan Board (25%). The CTV corporate group comprises over 50 corporations. CTV's CRTC licence notes its indirect controlling interest in EPI.

[14] Specialty provides broadcasting support to its clients, primarily Discovery Canada and TSN.

It provides technical services that include acquiring footage, in the field or studio, production and post-production services. It has production crews and post-production facilities, including specialized studios and editing suites, and a master control room for a number of channels. Specialty's facilities are located in a CTV building at 9 Channel Nine Court, Scarborough, Ontario.

[15] Specialty also owns 100% of CTV Specialty Sports Holding Inc., which owns 100% of TSN, a television broadcaster of live sporting events and related programming. The union is party to a collective agreement with Specialty, TSN and CFTO-TV for a bargaining unit that includes classifications of employees of each company.

[16] In 1993, Discovery Canada was incorporated and, at the time, it was 80% owned by Labatt's and 20% owned by the Discovery group of companies. In 1997, Labatt's sold its 80% interest in Discovery Canada to NetStar. In approximately 2001, Specialty acquired NetStar's 80% interest in Discovery Canada, with the remaining 20% owned by Discovery Services Inc., an American corporation (Discovery Inc.), which is unrelated to Specialty or CTV. When Specialty acquired NetStar's 80% interest in Discovery Canada, Discovery's offices, as well as those of EPI's, were moved from 2225 Sheppard Avenue East, Toronto to 9 Channel Nine Court. EPI has continued to share facilities with Discovery Canada.

[17] Discovery Inc. is a member of the U.S.-based Discovery group of companies, which includes Discovery International and American Discovery (Discovery U.S.).

[18] The evidence confirms that Discovery Canada is Canada's largest television broadcaster of science and technology programs. It is regulated by the Canadian Radio-television and Telecommunications Commission (CRTC) and the *Broadcasting Act*, S.C. 1991, c. 11 (*Broadcasting Act*). It is responsible for a number of Canadian specialty television channels, including The Discovery Channel, Discovery HD Theatre, Travel and Escape, Discovery Civilization Channel, Animal Planet, Canadian Learning Television and Access Alberta. The Discovery Channel is 100% owned by Discovery Canada, which holds its licence. In the information they provided, the parties have referred to Discovery Canada and Discovery interchangeably. For ease of reference, the Board will also do so and refer to both entities as "Discovery," since the distinctions between them do not

impact the Board's decision.

[19] Discovery's CRTC licence describes it as "a national English-language specialty service devoted to the exploration of science and technology, nature and the environment and adventure" and notes CTV's indirect controlling interest. Discovery's licence also subjects it to a number of conditions, including the amount of Canadian content it broadcasts and a requirement for Canadian program expenditures (CPE). Among other conditions, its licence requires that not less than 60% of its broadcast year and 50% of its "evening broadcast period" which the evidence revealed was between 6:00 p.m. and 12:00 a.m. (prime time) be devoted to Canadian programs. Also, its CPE requirement mandates that it expend not less than 45% (with the option of a 5% carry-over) of its previous year's gross revenues from advertisers and subscribers, on Canadian programs, which can be met by a Canadian production, co-production or acquisition.

[20] EPI's largest client is Discovery, although it has a number of other clients. Between September 1, 2006 to August 31, 2007 (2007 fiscal year), EPI earned 74% of its revenue from sales to Discovery, 16% from third-party sales and 10% from CAVCO tax credits. Third-party sales were made to such clients as Court TV, ABC Australia, France 5, A&E Television Network, The Biography Channel, Aboriginal Peoples Television Network (APTN), Alliance Atlantis Broadcasting Inc., CBC North, Canal D, National Geographic Television, Sun TV, Speed TV USA, Channel 4 UK, Channel 5 UK, 2 DF Germany and Corus Entertainment (YTV) Canada. EPI has clients unrelated to Discovery or Specialty with some being competitors to these broadcasters.

[21] EPI pitches new ideas firstly to Discovery, although Discovery does not have a first-look agreement with EPI. EPI also pitches to others, including broadcasters who compete with Discovery and Specialty.

[22] On or about January 1, 1995, Discovery began airing *@discovery.ca*, a daily science-based program, produced by its in-house production department. That program could not qualify for CAVCO tax credits as it was produced by Discovery, a broadcaster.

[23] In approximately the fall of 2002, Discovery discontinued producing *@discovery.ca*. Instead,

Discovery commissioned EPI to produce a similar program entitled *Daily Planet*. EPI retains the intellectual property rights to *Daily Planet*. *Daily Planet* is a daily one-hour magazine style television series. Approximately 20 of Discovery's employees who had been producing *@discovery.ca* began working full time with EPI on the production of *Daily Planet*. EPI's employees had similar employment contracts to those they had previously with Discovery and their past service dates with Discovery were recognized. All but one of the employees who are subject to this application (those holding the positions of producer, segment producer and visual researcher) are responsible for the production of *Daily Planet*.

[24] Discovery broadcasts the one-hour *Daily Planet* program twice per day, at 7:00 p.m. and 11:00 p.m., Monday to Friday. *Daily Planet* is the only daily program aired by a specialty broadcaster. *Daily Planet* is made up of both studio and field segments. EPI contracts out some of its production and most of its post-production and technical work on *Daily Planet,* primarily to Specialty. EPI attempts to finish its productions in HD, which requires specialized equipment. Specialty has approximately 20 editing suites, some suitable for HD, at least two of which are reserved exclusively for *Daily Planet*. EPI requires that its *Daily Planet* productions be suitable for future reversioning for prospective sales and has sold *Daily Planet* internationally.

[25] EPI has full-time employees most of whom work on *Daily Planet* and engages independent contractors for specific aspects of a production, who perform such functions as writing, talent, directing, rights clearance, and producing, including final productions.

[26] EPI contracts out much of its post-production work on its productions other than *Daily Planet* and most of this work goes to Specialty. This work involves camera, sound, studio, editing and post-production services.

[27] Since approximately 2001, EPI has shared the same building as Discovery, Specialty, TSN and some entities of CTV and others at 9 Channel Nine Court. EPI utilizes Specialty's services, including accounting, payroll, accounts payable and receivable, human resources, legal and business affairs, information technology and the telephone system (except it has its own telephone number).

[28] Other entities unrelated to CTV also share facilities at 9 Channel Nine Court, including Aramack Foods Company (Aramack), which provides a café and cafeteria facilities for the building, Primary Response Company (Primary), which provides security for the building, and Pilat, an Israeli systems company.

[29] Discovery, as a broadcasting undertaking, generates revenue from cable and satellite subscribers and television and website advertisers. Discovery fulfills some of its CRTC licence requirements for Canadian content, including prime time Canadian content, and CPE by commissioning EPI productions. Discovery also obtains Canadian content from over 20 other Canadian producers including *Cash Cab* from Castlewood and *Canada's Worst Driver* and *Canada's Worst Handyman* from Proper Television Inc. (Proper TV). Discovery has first-look agreements with at least three Canadian producers.

[30] Mr. Lewis is the President and General Manager of Discovery and EPI. There are approximately five other directors on EPI's board of directors who are Canadian and are from Discovery's, Specialty's or CTV's senior management, as well as one from EPI's senior management. Discovery's board of directors has approximately 5 directors, two of whom are from Discovery US.

III–Positions of the Parties

A–The Respondents

[31] The respondents submit that both applications should be dismissed because EPI is engaged in the production and distribution of factual content, and is not engaged in broadcasting. As such, its operations fall within provincial jurisdiction, not federal.

[32] The respondents acknowledge that Discovery and Specialty, which respectively hold direct and indirect ownership interests in EPI, are engaged in broadcasting, a core federal undertaking. However, they submit that the constitutional facts establish that EPI's operations fall within provincial jurisdiction.

[33] Specifically, the respondents assert that EPI's operations do not constitute a federal work or undertaking in its own right. EPI is not engaged in broadcasting itself, either as a traditional broadcaster or through its Website activities, as alleged by the union. Nor are EPI's operations functionally integrated with those of either Discovery or Specialty such that it is operated in common with either broadcaster as a single indivisible part of a federal undertaking. Rather, they say EPI operates as a separate entity, and is a sophisticated, independent producer with an extensive list of clients, primarily broadcasters. Finally, the respondents assert that EPI's operations are not vital, essential or integral to the operations of any federal work or undertaking, including Discovery or Specialty.

[34] The respondents submit that the evidence does not support the union's position that EPI's operations fall within federal jurisdiction under any of the applicable tests, and that these applications should be dismissed for lack of jurisdiction.

B–The Union

[35] The union submits that the constitutional facts and evidence establish that EPI's operations fall within federal jurisdiction and that its applications should be granted. The union argues that EPI is a federal undertaking on its own account, firstly, by virtue of its online activities, and that uploading its productions to its Website and thereby making them available to the public constitutes a form of broadcasting. As such, EPI is itself a broadcasting entity that falls within federal jurisdiction.

[36] Alternatively, the union argues that EPI is a non-severable component of Discovery and/or Specialty and is operated in common with either and/or both as a single federal entity, and thus falls within federal jurisdiction. As a further alternative, the union submits that EPI, as a Canadian content producer, plays a vital, essential and integral role to Discovery, in allowing Discovery to meet its minimum Canadian content requirements. In this way, the union argues that EPI is subject to federal jurisdiction as it is vital, essential or integral to Discovery, a federal undertaking.

[37] The union submits that the respondents' preliminary objection should therefore be dismissed.

IV–Analysis and Decision

[38] The Board's constitutional jurisdiction over federal undertakings and employees employed on or in connection with such undertakings is derived from section 4 of the *Code*:

> 4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

[39] The definition of "federal work, undertaking or business" is set out at section 2 of the *Code*. The relevant sections are:

> 2. In this Act,
>
> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,
>
> ...
>
> (*b*) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
>
> ...
>
> (*f*) a radio broadcasting station,
>
> ...
>
> (*i*) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces.

[40] Parliament derives the legislative authority cited in the above definition from the distribution of powers set out in sections 91 and 92 of *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 (*The Constitution Act, 1867*). Section 92(10) grants the provinces power over local works and undertakings, other than those enumerated. Section 92(10)(*a*) sets out, and thus places within federal jurisdiction, "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province." Section 91(29) gives the federal government power over those subjects that are expressly excepted from the enumeration of classes of provincial power.

[41] It is well established and not disputed here that labour relations generally fall within the provinces' exclusive jurisdiction over property and civil rights by virtue of section 92(13) of the *The Constitution Act, 1867*. Therefore, the federal government, and by extension the Board, may only assert jurisdiction where labour relations are shown to be "an integral part of its primary competence over some other single federal subject" (*Northern Telecom Limited* v. *Communications Workers of Canada et al.*, [1980] 1 S.C.R. 115 (*Northern Telecom*); and *Construction Montcalm Inc.* v. *Minimum Wage Commission et al.*, [1979] 1 S.C.R. 754 (*Construction Montcalm*)).

[42] It is not disputed here that broadcasting is one matter that falls within federal jurisdiction, and that both Discovery and Specialty are core federal undertakings by virtue of being broadcasting entities.

[43] There are three possible ways in which EPI may be found to fall within federal jurisdiction. First, EPI may be found to fall within federal jurisdiction in its own right, if it is found to be a broadcaster in its own right. It may also fall within federal jurisdiction if it is found to be operating in common with Discovery and/or Specialty as a single, indivisible, functionally integrated federal broadcasting undertaking. Finally, it may be subject to federal jurisdiction if its activities are found to be "vital," "essential" or "integral" to Discovery, a core federal broadcasting undertaking. The application of these various tests are described, partly or in total, by the Supreme Court of Canada in *United Transportation Union* v. *Central Western Railway Corp.*, [1990] 3 S.C.R. 1112 (*Central Western*); *Westcoast Energy Inc.* v. *Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (*Westcoast Energy*); and *Northern Telecom*.

[44] To resolve the constitutional question, one must inquire into the nature or character of the undertaking that is in fact being carried on and in so doing, one must look at the "normal or habitual activities" of the business as a "going concern," without regard for exceptional or casual factors, otherwise the Constitution could not be applied with any degree of continuity and regularity (*Northern Telecom*; *Construction Montcalm*; *Alberta Government Telephones* v. *Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225).

[45] In determining whether EPI's operations are subject to federal jurisdiction, the Board will first

examine whether EPI is a federal undertaking in its own right through its Website activities. If the answer is no, the Board will then assess whether EPI is a non-severable part of Discovery and/or Specialty and thus part of a broader federal undertaking. Finally, if EPI is found to be a separate undertaking, severable from Discovery and Specialty, the Board will examine whether EPI's activities are nevertheless vital, essential or integral to the operation of Discovery, a core federal undertaking.

A–EPI's Website Activities

[46] The union maintains that EPI is itself engaged in broadcasting as a result of its Website activities by uploading video clips of some of its programs onto its Website. Through its Website, EPI's programs, consisting of sounds and visual images, are available for reception by the public. This includes not only short segments, but some full length programs as well. Accordingly, the union argues that EPI's Website activities fall within the definition of broadcasting under the *Broadcasting Act*. The union submits that the reason EPI does not require a licence is not because the CRTC lacks jurisdiction to regulate "new media," but because the CRTC has exempted "new media" from regulation (Public Notice CRTC 1999-197). The CRTC has thus made a policy decision, it has not ceded jurisdiction over such activity.

[47] The union argues that EPI's Website is more than a mere marketing tool, and that EPI regularly and continuously engages in interprovincial broadcasting through its Website activities. In this regard, it suggests that EPI's Internet activities do not differ from those of CityInteractive, in *City-TV, CHUM City Productions Limited, MuchMusic Network and BRAVO!, Division of CHUM Limited*, 1999 CIRB 22, (*City-TV*), where the Board found that the online activities connected provinces on a regular and continuous basis and constituted broadcasting. The Board further found that CityInteractive's business was federal on its own accord, regardless of the type of technology used. The union argues that EPI is similarly broadcasting on its Website, since it allows the same productions to be viewed as those broadcast by traditional means. Consequently, its labour relations are properly governed by the *Code* and are within the jurisdiction of the Board.

[48] The respondents maintain that EPI's business is the production and distribution of factual

content unrelated to broadcasting, the Website being its marketing tool, ancillary to its overall business objective of producing and licensing its productions to clients. It argues that most businesses today operate an Internet site with video and this activity does not make an entity a broadcaster. The respondents submit that the fact that EPI does not and is not required to hold a CRTC broadcasting licence is constitutionally relevant and illustrates that the CRTC does not consider EPI's activities, including its Website activities, to constitute broadcasting. In any event, the CRTC has specifically chosen to exempt new media such as that on EPI's Website from regulation under the *Broadcasting Act*, on the basis that such activity does not contribute significantly to the broadcasting policy objectives, and more recently because it remains questionable to what extent displaying audio-visual content on the Internet constitutes broadcasting for purposes of the *Broadcasting Act*. Therefore, they submit it cannot be concluded that EPI is a broadcasting undertaking falling within Parliament's jurisdiction over broadcasting.

[49] The respondents assert that irrespective of whether EPI through its Website activities is engaged in "broadcasting", constitutional jurisdiction attaches to the entire undertaking based upon its normal and habitual activities, without regard to exceptional or casual factors. They assert that EPI's normal and habitual activities do not involve transmitting signals or connecting provinces, and its casual activities are not determinative of jurisdiction. According to the respondents, EPI, as a production company whose normal and habitual activities are the production and distribution of audio-visual content, falls within provincial jurisdiction.

[50] The facts disclose that EPI's Website activities involve displaying audio-visual content on its Internet site. The CRTC includes this activity within the category of "new media." The evidence is that the CRTC has chosen to exempt this type of Internet activity from regulation at this time and it remains the case that EPI does not have nor is it required to have a broadcasting licence. It is the Board's view in any event, that, whether this type of Internet activity falls within the statutory definition of "broadcasting" under the *Broadcasting Act* is not determinative of constitutional jurisdiction or the Board's jurisdiction over EPI's labour relations.

[51] An overview of the content of EPI's Website reveals that EPI does promote its productions on its Website, displaying its products. However, EPI's Website does not allow for purchases directly

from it. It has no downloadable video clips or purchasable video segments. Unlike the Websites of traditional broadcasters, such as Discovery, EPI does not generate advertising revenue directly from its Website, and its Website does not provide an online store from which clients can purchase merchandise. EPI does not then derive any direct commercial value from making the video clips of its content available on its Website.

[52] Nor does EPI's Website allow viewers to create an online account to customize their preferred programs or provide any interactive elements whereby viewers can post comments.

[53] Despite some speculations regarding what EPI's website may hypothetically contain in the future, the evidence indicates that EPI's Website content is not designed for, or directed at the general public, but is limited to, and is aimed at its prospective clients. On its website, EPI refers to a number of worldwide broadcaster clients, but does not link to their websites. Of 64 productions displayed on the Website, 52 contain five-minute clips, and 12 are full-length productions. In order to view more than what is on the Website, the prospective client has to apply to EPI to obtain a "pass" to do so. EPI's staff determines whether to grant each pass request individually. Passes are granted only to EPI's clients or prospective clients, not to members of the general public. Although not determinative of jurisdiction, EPI has an extremely low amount of traffic on its website compared to CTV's and Discovery's. For example, the evidence was that the number of hits on CTV's website is approximately 2.6 million per week; on Discovery's, 55,000 per week, and on EPI's, 100 per week.

[54] The union argues that because some full length productions are made available, this allows members of the general public to access programs just as they can if broadcast by Discovery or other broadcasters and EPI is thereby broadcasting. The Board does not accept, however, that the mere fact that some full length programs are made available in this manner, turns a production company into a broadcaster for constitutional purposes. The evidence establishes that EPI's Website activities are clearly not traditional broadcasting activities and their purpose and design differ from those of broadcasters, such as Discovery and CTV. Moreover, the evidence discloses that EPI's website more closely resembles those of other producers, as these do not generally contain advertisements and are not directed to the general public.

[55] The Board agrees with the respondents that it is not the use of certain physical equipment or a particular communication device (that is, the Website) that determines jurisdiction, but rather, the focus must continue to be on the nature or character of the undertaking as a whole, its normal and habitual activities and the nature of the services it provides. The question to be asked is: "what is [its] ordinary business?" (*Island Telecom Inc.*, 2000 CIRB 59).

[56] The Board concludes that EPI's normal and habitual activities as a going concern do not include broadcasting or telecommunications. EPI's Website activities, including showing audio-visual content consisting of some full length episodes, are promotional in nature, and EPI uses its Website as a marketing tool to promote its productions to clients and prospective clients, in furtherance of its business objectives as a content producer. It is not its intent or purpose to broadcast its content to members of the public in general or to generate revenue directly from the Website. EPI's ordinary business is that of producing and distributing content, to be licensed to broadcasters and others, and its Website activities are ancillary to this.

[57] In the Board's view, EPI's Internet activities are distinguishable from those of CityInteractive in *City-TV* and the activities in *The Shopping Channel, Division of Rogers Broadcasting Limited* (1997), 104 di 24; and 35 CLRBR (2d) 204 (CLRB no. 1200) (*The Shopping Channel*). In *City-TV*, the Board was seized with the task of determining the constitutional jurisdiction of CityInteractive, a division of CHUM Ltd., which was involved in the design and production of interactive marketing materials such as Websites and interactive services such as online chat services and webcasting for the CHUM television stations. After applying the constitutional tests, the Board found CityInteractive to be under federal jurisdiction as "the 'interactive arm' of the television broadcasting operation". The Board concluded that, even if CityInteractive was severable from CHUM, CityInteractive would be federal on its own account, as the Board found its webcasting services amounted to a form of broadcasting, and its other interactive services were interprovincial in nature, and were being performed on a regular and continuous basis as an integral part of CityInteractive's operation. The Board stated as follows:

> [165] The test for determining whether CityInteractive is an interprovincial undertaking on its own account boils down to the question of "what is the ordinary business of CityInteractive?" The answer

> to that question leads to the conclusion that CityInteractive's ordinary business connects provinces on a regular and continuous basis, rendering it federal in nature. CityInteractive is not a mere publisher on the Web. It carries on activities that in effect take television on-line and the Internet to the air.

[58] Further, the Board found that CHUM relied on CityInteractive to take TV online and carry its signal to the world over the Internet and CityInteractive to be "an essential link in the broadcasting chain," by providing the digital signal to the television operation and making the necessary connections to ensure its "on-air" transmission.

[59] The facts in the present case are distinguishable. The evidence shows that Discovery's and CTV's Websites perform functions similar to those of CityInteractive for their broadcasting operations. Discovery's Website links to its programming information, generates advertising revenue and contains various interactive features. EPI's Website activities differ and serve a different purpose. The Board is satisfied that EPI's Website activities do not form an essential link in the broadcasting chain and are not an integral part of its ordinary business, that of producing content.

[60] Similarly, the Board finds that EPI's Website activities are distinguishable from those described in *The Shopping Channel*, where the Board found The Shopping Channel to be a tele-shopping programming undertaking as defined in the *Broadcasting Act* in which the day-to-day operations required transmitting programs over provincial boundaries for reception by the public. Its ordinary business was thus dependent upon its ability to transmit its message as its means of operation. Despite the employer's argument that The Shopping Channel only produced infomercials and that Rogers Network Services did the broadcasting, the Board found The Shopping Channel itself was a link in the broadcasting chain.

[61] EPI is distinguishable from The Shopping Channel, because EPI's day-to-day operations are not those of a programming undertaking, an undertaking for the transmission of programs, and its means of operation do not depend on transmitting programming for its commercial success.

[62] For the reasons set out above, the Board finds that EPI does not itself engage in interprovincial activities having regard to the normal or habitual activities of the business as a going concern, and that its Website activities do not transform EPI's production undertaking into a federal broadcasting entity.

B–Single Enterprise Test - Is EPI non-severable from Discovery and/or Specialty?

[63] Having found that EPI is not federal on its own account as a result of its Website activities, it is necessary to look at whether EPI falls within federal jurisdiction because it is operating in common with, and indivisible from Discovery and/or Specialty, as a single enterprise.

[64] Both the union and the respondents agree that the applicable test for determining whether several operations together constitute a single federal enterprise or undertaking is set out in *Westcoast Energy*. The test stipulates that two or more operations be functionally integrated and subject to common management, control and direction. In *Westcoast Energy*, the Supreme Court of Canada explained the "single enterprise" test as follows:

> 49. In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(*a*), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not". He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise". In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient. ...

[65] The key elements of the test are functional integration and common management. One must assess the degree to which these elements are present in any given case and both must be present. Ownership by a federal undertaking will not be determinative. Mere physical connection or a close commercial relationship are insufficient to bring an otherwise local enterprise within federal jurisdiction.

[66] In assessing the overall degree of functional integration and common management, consideration is given as to whether the operation is exclusively or primarily dedicated to the operations of the core federal undertaking, whether the operations are under common ownership, and whether the goods or services of one operation are for the sole benefit of the other operation, or whether they are generally available (*Island Telecom Inc.*, *supra*).

[67] The union submits that EPI is indivisible from, and functionally integrated with Discovery and/or Specialty. It asserts that the business activity is one and the same, that of bringing TV programs into people's homes, and that the entities operate in common to achieve this objective. The union asserts that EPI is simply a corporate creation formed to carry on the same work as Discovery's in-house production department using the same employees in furtherance of its broadcasting operations, but to avail itself of the CAVCO tax credits denied to broadcasters. The union asserts that the entities are functionally integrated in that they share the same internal infrastructure such as payroll, accounting, human resources and other services, as well as the same facilities, with no discernable markings or signage to differentiate the entities. It maintains that EPI's use of the broadcasting support services of Specialty for its productions, including technical services, production and post-production services, is further evidence of functional integration. It urges the Board to pierce the corporate veil to find that there is no severable production undertaking.

[68] The respondents argue that EPI is an independent self-sustaining production company, a separate undertaking that is distinct and severable from the other entities. They say that their corporate objectives are different and distinguishable and they do not operate to a common plan. EPI's focus is on succeeding as a documentary content producer, generating revenue from licensing fees paid by broadcasters and labour tax credits derived from producing Canadian content, while Discovery focusses on broadcasting. As such, Discovery operates in a different market, generating revenue from cable and satellite television subscribers and sale of advertisements. They submit that EPI has no operational or functional integration with Discovery or Specialty.

[69] It is not disputed that there is common ownership and some limited overlap of some senior managers or officers between EPI, Discovery and Specialty. However, the overall evidence has failed to convince the Board that there exists substantial functional integration of the management and operations of EPI and Discovery and/or Specialty to find that they are operated in common as a single enterprise for constitutional purposes.

[70] The evidence in this regard supports the conclusion that EPI is, in essence, a production company, capable of sustaining itself as such, separate and severable from the other entities. Although not determinative, EPI's productions have been found to be eligible for CAVCO tax

credits, signifying EPI's legitimacy as a producer in its own right, and Telefilm Canada has certified EPI as a Canadian producer.

[71] With respect to the union's allegation that EPI's *Daily Planet* production is merely the continuation of Discovery's in-house production of *@discovery.ca* and the business of its in-house department in general, the Board is unable to accept this. The Board is persuaded on the evidence that EPI is much more than that, and has a legitimate business as a producer that is not dependent upon Discovery and/or Specialty for carrying on its business activity.

[72] While many of the employees who worked in-house for Discovery on *@discovery.ca* are the same employees who work for EPI on *Daily Planet*, the evidence establishes that EPI began operating in 1996, as a separate production company, producing its own productions, such as *Go For It,* at the same time that Discovery maintained its own in-house production department and was producing *@discovery.ca*. The two thus operated in tandem for a number of years. It was not until 2002, that *@discovery.ca* ceased production and EPI began producing *Daily Planet*.

[73] It was acknowledged that part of the rationale for the change was to enable the daily program to become eligible for the CAVCO tax credits. However, the evidence confirmed that in addition, there were other changes made, both in content and technical sophistication, which reflected EPI's desire to attract more viewers, especially younger viewers, as well as to enable EPI to resell the program to other national and international broadcasters, which it has been able to do.

[74] With the changes, Discovery became *Daily Planet*'s commissioning broadcaster, and, as a result, there is a close affiliation and perceived connection between Discovery and EPI. This is evidenced by some overlap in the use of their logos, business cards, and promotional materials and activities. However, this connection does not signify to the Board that the two are operating as one single enterprise, or that EPI is just an in-house department of Discovery. The two entities are parties to commissioning licencing agreements, such that Discovery pays EPI for the broadcasting rights and the ability to provide creative input into the production. EPI retains the copyright for purposes of resale. Production of *Daily Planet* is not merely an in-house service provided.

[75] Because *Daily Planet* is a daily production, it requires a certain number of dedicated full-time employees, which accounts for why EPI chose to take on the same employees previously working for Discovery. This is unlike EPI's other productions, which are mainly managed by contracting for specified skills, labour and equipment, as required.

[76] EPI does primarily continue to use Specialty's support services to complete the *Daily Planet* productions. However, the Board does not view this as determinative evidence that EPI operates in-house for Discovery, as asserted by the union. The evidence confirmed that it is not uncommon for Canadian producers to contract out for services, including for technical and post-production work. Further, because *Daily Planet* is a daily series requiring superior technical post-production work, EPI uses Specialty because of its quality, consistency and convenience. Moreover, EPI pays Specialty to perform these services.

[77] In light of the above, the Board is not persuaded by the union's assertion that EPI's production of *Daily Planet* is merely the continuation of Discovery's *@discovery.ca* and thus the continuation of its in-house production department. The Board has previously indicated that jurisdiction flows, not from the actual work performed by an employee, but rather from the work of the undertaking within which those employees function. (*Shamrock Television System Inc., CKOS-TV and CICC-TV* (1987), 70 di 168; and 17 CLRBR (NS) 205 (CLRB no. 639) (*Shamrock*)). Accordingly, the fact that EPI produces *Daily Planet* with many of the same employees who had worked in-house for Discovery's *@discovery.ca* is not determinative. It is the work of the undertaking that is significant to jurisdiction. Although EPI produces *Daily Planet*, which may help to further Discovery's broadcast objectives, it does this in accordance with a licensing agreement negotiated to further its own business objectives as a producer. EPI's work as a production undertaking is far more varied and significant than just the production of *Daily Planet* for Discovery.

[78] In that regard, *Daily Planet* is by no means EPI's only production. The evidence confirms that, while most of EPI's productions are commissioned by Discovery, and Discovery is EPI's largest client, Discovery is not EPI's only client. EPI has approximately 70 clients, primarily broadcasters, that also include government agencies, private companies and educational distributors. EPI continues to attempt to grow its business and its numerous clients have included competitors of Discovery and

Specialty. Because EPI retains the copyright to its productions, EPI can and does earn additional revenue from resale or reversioning productions, including productions that are originally commissioned by Discovery. In addition to its creation of Canadian content productions, EPI also enters into treaty co-productions with foreign producers and broadcasters, whereby it provides Canadian content and retains the Canadian as well as other licensing rights. The evidence establishes that EPI earns substantial income each year from clients other than Discovery.

[79] Further, the evidence indicates that EPI maintains creative control of its work. Its own employees determine what new ideas to pitch and to which broadcasters it will pitch them. Generally, EPI pitches its ideas first to Discovery, since Discovery is among the largest buyers in the area of science, technology and nature, but not because it is required to do so. Unlike some of the other Canadian production companies, EPI does not have a "first-look" agreement with Discovery.

[80] The evidence confirms that, for most of its productions other than *Daily Planet*, EPI independently engages contractors on a project-by-project basis. It rents the necessary equipment as needed and contracts out its post-production work. EPI has its own personnel, namely the Director of Productions, the Executive Producers, Director of Business Operations and other senior employees, who are responsible for managing operations on a day-to-day basis. They oversee the development of EPI's programs from start to finish, including deciding what ideas EPI will "pitch" and determining its sale price requirements, negotiating the licencing agreements, hiring the necessary employees, budgeting, instructing producers, and directing the technical employees regarding the post-production work it contracts out. The union suggests that the licencing arrangements between EPI and Discovery, when Discovery is the commissioning broadcaster, are not at arm's-length, are commercially favourable to Discovery and that EPI forgoes any real profit on such productions. This, it asserts, is evidence that the two operate in common as a single enterprise.

[81] It cannot be disputed that there were certain arrangements between the two entities that allowed them to take advantage of their corporate as well as their commercial relationship in order to maximize their mutual profit. However, the evidence established that EPI negotiates each licensing agreement separately, so as to best reflect the relationship in question, with different terms and

clauses being more or less important for certain parties. This included those negotiated with Discovery. The evidence was that Discovery was focussed on attracting viewers and advertisers, at the least cost, regardless of the producer. Discovery gave EPI no preferential treatment over other producers and in fact, turned down many of EPI's pitches. However, when Discovery did agree to commission a production, and negotiated a licence agreement, EPI could forego some profit margin, knowing that it could also rely on third party sales from the commissioned product. Both parties still had their own interests to protect.

[82] In the Board's view, it cannot be concluded on the evidence that EPI was set up only to produce content for Discovery or that EPI's operations are solely dedicated to Discovery. The situation is somewhat similar to that in *Canadian Pacific Railway Co.* v. *British Columbia (Attorney General)*, [1950] 1 D.L.R. 721, where it was found that although the Empress Hotel was owned and managed by the Canadian Pacific Railway, it constituted a separate business or undertaking. These entities were designed to facilitate each others' business, and the hotel was not set up exclusively or even principally for the railway's travellers. Similarly, EPI and Discovery have a mutually beneficial commercial arrangement, largely because of the nature of EPI's productions (science, nature and technology) which fits Discovery's programming requirements. Such an arrangement, however, will not automatically result in a finding that the two are operating in common as a single entity or that one is vital, essential or integral to the other.

[83] Nor will a federal undertaking purchasing most of a subsidiary's work be sufficient to bring an otherwise provincial entity under federal jurisdiction (*Wardair Canada* (1975) Ltd. (1978), 32 di 248; and [1979] 1 Can LRBR 49 (CLRB no. 155) (*Wardair*), upheld in *Canadian Air Line Employees' Association* v. *Wardair Canada (1975) Ltd.*, [1979] 2 F.C. 91 (F.C.A.); *Telus Management Services Inc. et al.* v. *I.B.E.W., Local 348 (1994),* [1994] Alta. L.R.B.R. 281; 25 C.L.R.B.R. (2d) 199 (*AGT Directory*) aff'd *IBEW, Local 348* v. *LRB and AGT Directory,* [1995] Alta. L.R.B.R. 129).

[84] Finally, it cannot be said that just because parties have a corporate connection and attempt to keep profits within the corporate family when doing business together, they are necessarily operating in common as a single federal entity for constitutional purposes. In *Wardair*, for example, the Board

found that Intervac, an operator of a wholesale travel business, was found to be under provincial, not federal jurisdiction, even though Wardair, an exclusive charter airline, was a sister company with whom Intervac did a significant amount of business. The Board, in describing Intervac, stated:

> ...However, of its airline business over 90% is contracted with Wardair and this accounts for approximately 70% of its total business. For obvious reasons related to its corporate familiarity with Wardair it prefers to do business with Wardair. That keeps corporate profits in the family.
>
> (pages 257; and 56)

The Board, despite this and other evidence of close corporate and functional links, nevertheless found Intervac to be under provincial jurisdiction, because Wardair was still a charter air carrier and Intervac was still a tour operator and charterer. Similarly, despite their corporate and commercial links, Discovery is still a broadcaster and EPI is still a producer of content.

[85] With respect to the sharing of facilities and services, the union argues that there is an interconnection between the companies, both functionally and outwardly, which shows that EPI is operated in common with Discovery and/or Specialty as a single federal enterprise. First, the union points out that EPI works out of the same facility as Discovery, Specialty and other CTV related companies, which is owned by an entity of the CTV group. EPI utilizes Specialty's infrastructure and services, such as payroll, accounting, human resources, information technology and reception within the facility, without any real distinction between their corporate identities. The union alleges that EPI is not comparable to a private for-profit production company because it has no finance department, does not prepare its own financial statements, and has no cheques or contracts supporting its alleged management fees paid to Specialty, claiming EPI is just a "kickback" of Discovery's licensing fees.

[86] The evidence establishes, however, that EPI pays Specialty a management fee for these various systems and services, which also includes rent for the premises it occupies. EPI pays Specialty a determined amount each year by way of inter-company transfer, which is allocated across EPI's productions, such that a pro-rated amount is attributed to each production as "corporate overhead". Moreover, EPI's expenses and labour costs are tracked and accounted for, as shown in the schedule of production costs attached to the CAVCO applications in evidence, which applications are also audited by the Canada Revenue Agency. Broadcasters like Discovery are also subject to audit to

ensure fulfilment of CRTC requirements. The Board is satisfied on the evidence that these management fees represent a deliberate and legitimate accounting for the services rendered, allocated across EPI's productions.

[87] With respect to the employees, EPI's job functions in its workplace are distinct from those at Discovery and Specialty. The evidence is that employees of Discovery, Specialty and EPI work well together and may have some interaction, but they are not used interchangeably to perform the same or similar functions. There is thus no evidence of intermingling.

[88] There was some evidence to the effect that certain EPI employees had business cards or other documents displaying Discovery's, Specialty's and/or CTV's logo or otherwise appearing to be working for these other entities and that EPI's Website displayed the logos of Discovery and CTV. The Board accepts that Mr. Leadman is the head of Worldwide Program Distribution for EPI, Discovery and CTV, that Mr. Lewis is the President and General Manager of EPI and Discovery and that there is some common salesmanship that occurs at trade shows and other business and promotional functions. However, the evidence indicated that this was not an uncommon practice in the industry where it is accepted and understood that broadcasters have greater name recognition than production companies. Certain EPI employees will make use of their affiliations and use the CTV and Discovery names, where appropriate, in making sales pitches or seeking participation in a program, for name recognition. The evidence disclosed that an unrelated producer who, at times, works with EPI on *Daily Planet* and other productions, has business cards displaying logos of *Daily Planet*, EPI, Discovery and Bell Globemedia. The Board accepts that the use of broadcasters' names, logos and promotional materials is to exploit the broadcasters' name recognition within the broadcasting community, and is not determinative evidence of common management, control and direction, for constitutional purposes.

[89] With regard to Specialty employees, the evidence confirmed that when EPI engages Specialty for post-production work, Specialty supplies not only the equipment but the technical employees to operate it, as well. EPI's staff work closely with Specialty's technical employees on the post-production to provide EPI's requirements. When this occurred, the work of each entity's employees would remain separate and accounted for. The Board also finds that the evidence

established that EPI employees do not work on or participate in the actual broadcasting operations.

[90] The union also argues that the entities operate in common and in such a way as to keep profits in the corporate family. It contends that EPI uses Specialty's services for most of its production and post-production work on *Daily Planet*, and for post-production work on most other productions, so that Specialty derives the benefit and so EPI can use its post-production expenditures paid to Specialty to secure CAVCO tax credits. First, as with the management fees paid to Specialty, EPI's post-production and other expenses paid to Specialty are independently audited as shown in the CAVCO applications, and EPI has to demonstrate that each cost was used and paid for, for the specific production. The evidence was that the costs vary from production to production depending on the nature of the work required, and the expenses are calculated regularly and paid by way of inter-company transfers.

[91] Further, the evidence confirms that, although EPI uses Specialty for the majority of its post-production and technical work, it does not use Specialty exclusively, nor is it obligated to do so. EPI has engaged other companies to perform similar work. Conversely, Specialty offers post-production and other services to companies unrelated to the CTV group. The Board is satisfied that these represent legitimate expenses for services and work performed, despite being between affiliated corporate entities. As noted above, the jurisprudence supports the notion that a corporate relationship and resultant sharing of corporate resources and services, and arrangements to keep profits within the corporate family, are not sufficient to bring an otherwise separate undertaking under federal jurisdiction (*Wardair*).

[92] Both the union and the respondents have identified *Shamrock* and *White Iron Film and Video Productions, a division of CFCN Productions Limited* (1991), 83 di 205; and 15 CLRBR (2d) 93 (CLRB no. 844) (*White Iron*), upheld by the Federal Court of Appeal in *National Association of Broadcast Employees and Technicians (NABET)* v. *CFCN Television*, (1992) 145 N.R. 154, as relevant authorities, since both address the constitutional jurisdiction of production entities in their relations with federal broadcasting undertakings. The union suggests that the facts of this case more closely resemble those in *Shamrock*, in which the Board found a specially created production division, connected with the television station operations, to be under federal jurisdiction as part of

the broadcasting undertaking. The respondents, however, assert that the facts of this case more closely resemble those in *White Iron*, in which the Board found that a production company, created by a television station to perform the station's previous in-house work, to be a separate undertaking under provincial jurisdiction, as it did not have the requisite operational and functional integration with the station to be a single federal entity.

[93] The Board agrees that both decisions are instructive in this instance. In *Shamrock*, Shamrock operated two television stations in Yorkton, as well as other television stations and cable facilities across Saskatchewan. Shamrock had its own in-house production employees (bargaining unit employees) who produced commercials for broadcast by the Yorkton stations. Shamrock created a special division, named Image Creative Services (ICS), specifically designed to produce more sophisticated local commercial messages. A specific group of employees was designated to work for the new ICS division. The in-house employees continued to produce the less sophisticated commercials. They also produced a few training films and promotional pieces, which work was characterized as "casual sidelines." They also worked on two programs shown on Shamrock's stations, during which time they were intermingled with Shamrock's bargaining unit employees.

[94] Despite noting certain characteristics of independence of operations, the Board was not convinced that the ICS division operated in a separate and distinct manner, and ultimately concluded that ICS was a non-severable part of the Shamrock whole. The Board found that ICS did not "drum up" its own business, as its production work was usually derived from a Shamrock salesperson. ICS did not retain property rights to the commercials, which became the property of the advertiser. Further, the actual producing of the commercials frequently required contributions from Shamrock bargaining unit employees. Their work on the programs was completely integrated with the work of Shamrock's bargaining unit employees, and no separate costs were identified or charged between the two groups of employees. The Board also found there were "ongoing intimate interconnections" between the regular TV station work and ICS work, regarding such things as sharing of equipment or certain work or services and finances.

[95] The Board concluded that ICS employees performed many of the same tasks and produced many of the same products as Shamrock bargaining unit employees, although at a more sophisticated

level. ICS employees were no more distinguishable than any other group of employees within the already certified unit. The Board stated as follows:

> The employees in ICS are clearly employees of Shamrock, equally as much as are the persons whose status is not in dispute and have been included in the certification order. Image Creative Services is simply a label for a team of employees who do some particular work, but who must rely on others in order to produce or finish their product and who in turn are relied on by the clearly federal operations of Shamrock for services and support. ... It is not even a discrete and self-sufficient team because people from other areas of the Shamrock business have to provide services in order to complete the so-called ICS product. The fact that ICS is assigned space in a separate building 100 feet away from the bulk of the bargaining unit, and has a separate phone number, are not matters of any significance.
>
> Certainly, Shamrock could live and operate without this group with this particular label. But it is clear that it is nevertheless functionally dependent in the day-to-day task of creating material for television transmission, to a considerable degree, upon the skills of individuals within ICS operating the specialized equipment which has been assigned to ICS.
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> (pages 173; and 210–211)

[96] There are some similarities between *Shamrock* and the instant case, as the union points out, such as the sharing of facilities and infrastructure and EPI performing some work that was similar to that previously done in-house. However, the Board is not persuaded, on the overall evidence, that the similarities warrant a similar conclusion. There are many distinguishing features which the Board finds more persuasive, and concludes that there is not the same level of functional and operational integration between EPI and Discovery. While there may be some sharing of infrastructure and services, unlike in *Shamrock*, there is also a clear accounting for these services. As explained above, EPI pays a management fee for all of these services, including rent for its premises.

[97] In addition, there was no evidence of intermingling of employees, as was the case in *Shamrock*, and any post production and technical functions performed by Specialty employees, were functions EPI lacked capacity to perform and instead, paid Specialty for its services.

[98] The Board's decision in *City-TV* is also instructive in this regard, although it did not deal with a production company. In *City-TV*, the Board found that the subsidiary in question, CityInteractive, was the "interactive" arm of the television broadcasting operation CHUM, such that they were conceptually, functionally, operationally and physically integrated. The Board took note of such factors as the sharing of common resources, equipment and support services, like accounting, payroll and telephone systems. More importantly, however, the Board noted the actual integration of the

functions and skills of the employees in question. The evidence showed that CHUM was divided into two main operations, television or radio, with everything categorized into one of these groups. CityInteractive was categorized under television. CityInteractive employees performed functions such as the production and design of Websites, e-commerce activities and interactive services, as well as the distribution of CD-ROMs. There was a clear finding of intermingling and interdependence between CityInteractive employees and other CHUM employees. The Board described the circumstances as follows:

> [137] As in *Shamrock Television*, *supra*, none of the factors that governed the decision in *Paul L'Anglais* and *CFCN Television*, *supra*, are present in this case. The functions that are at issue here, that is, production and design of Web sites, distribution of CD-ROMs, E-commerce activities and interactive services, are all performed by CHUM employees. CityInteractive employees are not slotted into narrowly defined jobs and they often perform a number of different tasks that service, or are supportive of, more than one television station. They are administratively and functionally integrated with the other employees of the television operation. In some instances, the work at issue, such as the updating of Web sites, is performed by employees who work in other CHUM departments. In other instances, it is television station work that is performed by CityInteractive people, as in the case of on-line chat. In such cases, CHUM depends upon the technical skills of CityInteractive's staff in the digital domain for the interactive elements incorporated into the television shows. Conversely, CityInteractive also depends on the skills and technical support of employees of various CHUM departments, such as the IT department and the Engineering department, in the performance of several functions.
>
> [138] As in *Shamrock Television*, *supra*, CityInteractive is simply a label for a team of employees who do some particular work, but who must rely on others to produce or update the product and who in turn are relied upon by the clearly federal operations of CHUM for services and support. The CityInteractive team is fully integrated to the overall CHUM organization and more particularly, to its television operation as is, for example, the unit of IT people who provide informatics support and services to CHUM's television operation in the ChumCity building. Functional integration is perhaps best evidenced by the fact that CityInteractive participates on a regular and continuous basis in two television shows, *Go With the Flow* and *Electric Circus*, as an integral part of these shows.

[99] This level of functional and operational integration and intermingling of employees, skills and services is simply not present in the instant case.

[100] The facts in the present case are distinguishable from those in *Shamrock*, where almost all of ICS' work was performed for Shamrock. Similarly, in *City-TV*, all of the CityInteractive work was performed exclusively for CHUM. The work that EPI produces for broadcast clients other than Discovery cannot, in the Board's view, be described as "casual sidelines," but represents significant income generating work. Unlike the ICS group in *Shamrock*, *supra*, EPI does "drum up" its own business and does retain the property rights to its productions. Despite *Daily Planet* being a large

volume of the work performed by EPI for Discovery, this does not detract from the fact that EPI controls the content, directs the work, manages the day-to-day operations, and performs independently, pursuant to licensing agreements with Discovery, albeit by contracting out for technical assistance. Overall, the Board is not persuaded that there exists the same level of functional and operational integration as there existed in *Shamrock* or *City-TV* so as to oust the presumption of provincial jurisdiction over a production operation.

[101] In *White Iron*, the situation was similar in that a federal broadcaster, CFCN Communications Ltd. (CFCN), transferred some of its in-house production department's work to White Iron, a newly created division of CFCN Productions Limited, which, in turn, was wholly owned by CFCN. To assist with the start-up of White Iron, CFCN-TV provided some financial backing and production equipment, and some CFCN-TV production employees were offered and accepted employment at White Iron. The union representing CFCN-TV employees filed a common employer/sale of business application so as to continue representing the employees of White Iron. The employers opposed the applications asserting that White Iron's operations fell under provincial jurisdiction.

[102] Similar to the facts in *Shamrock*, CFCN-TV continued to maintain its own in-house production department, which supplied all the productions required to fulfill its CRTC licensing obligations, while White Iron was to perform all of the "non on air" client work, namely video-taped programs for other than television broadcasting purposes. In *White Iron*, the Board found White Iron to be a separate undertaking with its own purpose independent from CFCN-TV and was to become a separate stand-alone production enterprise to compete in the lucrative production marketplace doing work for clients that may or may not be TV stations. The Board reached this conclusion despite the fact that CFCN-TV provided financial backing; there was sharing of equipment, editing facilities, studio time and some facilities and administrative services between White Iron and CFCN-TV. In addition, sales employees of each entity worked closely together to solicit the same clients. White Iron did, however, have its own objectives, management, workforce, logo, telephone system, bank account, billing and pay system, and operated from a separate location. It was noted that White Iron was billed for the use of CFCN-TV facilities.

[103] The essence of the decision of a majority of the Board in *White Iron* was that it was persuaded

that White Iron was truly an independent distinguishable production company, and the fact that there was a certain sharing of facilities, equipment and services did not alter that finding. The Board distinguished the facts in *White Iron* from those in *Shamrock,* stating that the two cases were not comparable, "particularly in light of the presence of a separate undertaking in this case. ... [In] the *Shamrock* decision... there was no distinguishable production undertaking."

[104] In the Board's view, the facts in the present case are similar to those in *White Iron* and warrants the same conclusion. As in *White Iron*, EPI was created as a separate production entity, which competes in the production marketplace for clients which are mainly, but not only, broadcasters. It produces a program with similarities to that previously performed in-house by Discovery, but now subject to the terms of a licencing agreement. As in *White Iron*, EPI has its own purpose and objectives. EPI is designed to excel as a documentary content producer and to promote and pitch its content to any and all clients willing to commission its work and pay licensing fees for the right to broadcast its programs. This includes Discovery, but many other broadcasters as well.

[105] The union argues that *White Iron* is distinguishable on the basis that CFCN -TV maintained its in-house production department which satisfied its CRTC licensing requirements, whereas EPI is the one that produces *Daily Planet*, which fulfills much of Discovery's CRTC licensing requirements. The evidence confirms, however, that EPI is one of many different Canadian producers who provide Canadian content for Discovery and the fact that *Daily Planet* is produced by EPI does not alter the constitutional conclusion. This argument will be addressed in greater detail in the following section. In the Board's view, EPI has, in its own way, developed its own business with its own client base, and its own level of independence to establish itself as a production undertaking, despite common ownership and a close commercial relationship with its affiliated companies. The evidence satisfies the Board that EPI is more than the continuation of the in-house production department of Discovery dressed in a different corporate costume.

[106] On the basis of all of the above, the Board is satisfied that the constitutional facts before it fail to show a sufficient degree of functional integration and common management between EPI and Discovery and/or Specialty, to support a finding that EPI is a single enterprise operating in common with Discovery and/or Specialty, so as to bring it under federal jurisdiction.

3–Is EPI Vital, Essential or Integral to Discovery?

[107] Having found EPI not to be a federal undertaking in its own right or a single enterprise operating in common with a federal undertaking, it remains to be determined whether EPI's operations fall within federal jurisdiction because its activities are vital, essential or integral to Discovery's core federal broadcasting undertaking.

[108] Both the union and the respondents cite *Northern Telecom* as relevant authority. In that decision, the Supreme Court of Canada summarized the approach as follows:

> A recent decision of the British Columbia Labour Relations Board, *Arrow Transfer Co. Ltd.* [[1974] 1 Can. L.R.B.R. 29], provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the Chairman of the Board phrased it, at pp. 34-5:
>
> "In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship."
>
> In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, *i.e.*, the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.
>
> (pages 132–133)

[109] The requisite analysis thus involves looking at the normal and habitual activities of the subsidiary operation as a going concern, and then assessing the practical and functional relationship of those activities to the core federal undertaking. It is not disputed that nothing turns on the fact of corporate ownership alone, which will not in itself cause an otherwise local undertaking to fall within federal jurisdiction (*Northern Telecom*).

[110] In considering this aspect of the constitutional test, much of the evidence and analysis outlined in the previous single enterprise test will again be applicable. Nevertheless, the Board will address

the requisite factors and focus on those that have not yet been dealt with.

[111] The union submits that because EPI and Discovery are functionally, operationally and managerially coordinated, and under common ownership and direction, (as it argued in the previous section), EPI's operations are vital, essential and integral to Discovery so as to bring EPI under federal jurisdiction. The union further submits that Canadian content producers such as EPI are vital essential or integral to Canadian broadcasters, such as Discovery, because they fulfill the essential role of allowing broadcasters to meet their Canadian content requirements.

[112] The respondents, on the other hand, argue that EPI's operations are separate and distinct from Discovery and Specialty, and are not vital, essential or integral to them. Discovery is not dependent on EPI to meet its Canadian content requirements or otherwise and would not be disadvantaged if EPI ceased operating.

[113] When looking at the nature of EPI's business as a going concern, the Board accepts that EPI is in essence a producer engaged in the production and distribution of factual content, primarily television documentaries, with a focus on science, technology and nature.

[114] It has already been established that EPI is owned by Discovery and that Discovery is EPI's largest client. There is also a close commercial relationship between them, by virtue of their mutual focus on programming devoted to science, technology and nature. The manner in which the two entities conduct their business also involves certain efficiencies derived from their corporate relationship. This includes sharing of premises, facilities and infrastructure, for which payments are made through inter-company transfers. Further, EPI pays Specialty for services including use of equipment, editing studios and performance of post-production and technical work.

[115] In this regard, the Supreme Court of Canada's decision in *Canada Labour Relations Board et al.* v. *Paul L'Anglais Inc. et al*, [1983] 1 S.C.R. 147 (*Paul L'Anglais*) is informative. There was a dispute between the parties as to the precedential value of the decision in *Paul L'Anglais* because of the nature of the issue and lack of specific evidence before the Court. The Board is of the view that, at the very least, the decision is applicable to illustrate the general nature and application of the

test in relation to the broadcasting and producing functions.

[116] In that case, the Supreme Court of Canada considered whether there was a vital, essential or integral relationship between Télé-Métropole Inc., a television broadcasting undertaking and two of its subsidiary operations, one of which was a company that produced programs and commercial messages. The Court applied the *Northern Telecom* test and first found, among other things, that the activity of producing program content and commercials did not fall within the definition of broadcasting. It then stated that the activity of producing programs and commercials and selling them to a broadcaster did not turn the producer into a broadcasting undertaking. Thus, if those activities are undertaken by an unrelated company, the entity would remain under provincial jurisdiction. Finally, it stated that the links of the subsidiary, namely the corporate relationship and the commercial benefit it provided to the broadcasting undertaking by its services, did not have the effect of making the producer part of the television broadcasting undertaking, so as to bring it under federal jurisdiction. The possible exception would be if those activities were in some way indispensable to the broadcasting operation.

[117] It may be taken from this that, as a general rule, production of programming content itself is not ordinarily considered to be part of broadcasting, even where there is overlap of corporate directors and the sharing of facilities. Such overlap is not sufficient to establish that the subsidiary operation is vital, essential or integral to the core federal undertaking. This does not mean, however, that the relationship between two such entities can never meet the test and every case will turn on its own specific facts.

[118] Applying these general principles to the facts of the instant case, EPI, as a producer, would not be found to be vital, essential and integral to a broadcasting undertaking simply due to its corporate ownership, its overlapping officers and directors, its sharing of facilities and systems, nor its mutually beneficial corporate and commercial relationships. These factors would be insufficient to establish the requisite relationship to oust provincial jurisdiction (see also *Central Western* and *AGT Directory*).

[119] What remains, is to assess the level of interaction and extent of the relationship in a broader

operational sense, including a determination of the level and extent to which Discovery, the core federal undertaking, relies upon or is dependent upon the operations and services of EPI, the subsidiary undertaking, to conduct an essential aspect of its own business and to further its own business purposes and objectives. To use the language of *Paul L'Anglais*, are EPI's activities indispensable in some way to Discovery's broadcasting operations?

[120] In this regard, the union argues that they are. It asserts that EPI is vital, essential and integral to Discovery's broadcasting operations, first, because Discovery relies on EPI's operations to produce programming for broadcast by Discovery, specifically *Daily Planet*, but in particular, because it provides Discovery with the Canadian programming content and its CPE that it requires under the *Broadcasting Act* and the terms of its broadcasting licence, issued by the CRTC.

[121] The union maintains that Parliament has created a regulatory scheme to promote Canadian productions, and has thus imposed requirements for minimum levels of Canadian content; every broadcaster must broadcast a certain percentage of Canadian programs over the course of the year and a certain percentage during specific time periods (prime time) of each broadcast day. These requirements are monitored by the CRTC and compliance is a condition for maintaining a broadcast licence. Discovery's licence specifies the percentages of time that it must broadcast Canadian content. The union asserts that EPI produces 45% of Discovery's Canadian content requirements, which contribute to both its yearly and its daily prime time requirements. In fact, *Daily Planet* alone is broadcast twice each evening from Monday to Friday and amounts to two-thirds of Discovery's 50% daily Canadian content requirement for this period. As such, the union maintains that EPI is thereby vital, essential and integral to Discovery's broadcasting operations and, specifically, to its ability to meet its CRTC broadcast requirements.

[122] As to Discovery's Canadian program expenditures (CPE), Discovery, as a condition for its licence, must expend 45% (with a 5% carryover) of its previous year's gross revenue on Canadian programs. The union asserts that because Discovery expends over one-half of its program expenditures on programs produced by EPI, Discovery is further dependent upon EPI to meet its mandatory licence requirements as a broadcasting undertaking, illustrating that EPI is even more vital, essential and integral to the broadcast operations.

[123] The union likens this situation to that in the Board's decision in *Nordia (Ontario) Inc.*, 2003 CIRB 221 (*Nordia*). In that case, Bell Canada (Bell), a federal telecommunications undertaking, contracted out its directory assistance services to Nordia (Ontario) Inc. (Nordia). The Board found that directory assistance services were an important feature of the overall services Bell provided to its customers. Bell clearly held itself out as the one providing the service. There was close physical and operational integration, as Nordia employees used Bell's database and then released the call to Bell's automated voice system. Thus, Nordia was unable to fulfill its function without close interrelationship and co-ordination with Bell's system.

[124] More importantly to the union's argument, in *Nordia*, the Board considered that the primary service Nordia performed for Bell was a service expressly regulated through the standards of service required of Bell by the CRTC. The CRTC regulated standards for directory assistance, relating to speed and accuracy, with which Bell had to comply. The responsibility for maintaining the quality remained with Bell, which chose to contract out the service and thus its performance obligation, to Nordia. The Board concluded that Nordia's operations were therefore vital, essential and integral to the fulfilment of Bell's obligations to the CRTC. It found Nordia's operations, through its contract and requisite commitment to meet the CRTC standards imposed upon Bell as a telecommunications provider, were inextricably linked to Bell's telecommunications operations.

[125] The union argues that, in the same way, EPI's activities, in producing the programming that allows Discovery to meet its CRTC requirements, are vital, essential and integral to Discovery's broadcasting operations.

[126] The respondents deny *Nordia* is directly applicable to the instant case and the Board agrees. In the Board's view, EPI's situation differs from that in *Nordia* as Nordia was providing directory assistance services to Bell and their contract required Nordia to fulfill licensing requirements. In contrast, EPI provides Discovery with a final product, namely a production with a right to broadcast. It is for Discovery to decide when it will be aired as part of its overall programming strategy to meet its CRTC requirements. Unlike in *Nordia*, Discovery has not contracted out the responsibility to comply with its regulatory requirements, but retains this. EPI's role is simply one of a number of

suppliers of the product that can be used by Discovery to fulfill its regulatory requirements. EPI does not itself fulfill the licensing requirements and is not thereby "inextricably linked" to Discovery's broadcasting operations.

[127] Moreover, there is not the same level of operational integration and co-ordination between the operations of EPI and Discovery, on the basis of the previous functional integration analysis, as was found between Bell and Nordia, to establish the requisite vital, essential or integral relationship.

[128] The evidence established that Discovery contracts with other Canadian content producers and airs their productions, which are credited against Discovery's CRTC requirements. There was evidence given that no other Canadian producer could produce *Daily Planet*, which presently contributes largely to fulfilling Discovery's Canadian content requirements. There was no evidence, however, that Discovery could not replace the amount of Canadian content programming provided by EPI through other Canadian producers. *Daily Planet* itself, in its unique format as a daily magazine series, is not essential. None of the other Canadian specialty broadcasters have a daily show like *Daily Planet* and yet they meet their licence requirements.

[129] Discovery does not rely exclusively or even substantially on EPI to provide its programming content. Discovery has commissioned productions from over 20 Canadian production companies, such as Cineflix, Barna-Alper Productions, Proper TV and Castlewood. The evidence was that EPI's productions represented approximately 57% of the Canadian productions commissioned by Discovery, 27% of its year-over-year Canadian content and 14% of its year-over-year overall programming, during the 2007 broadcasting year.

[130] It was indicated in evidence that Discovery uses other producers' content, because it requires popular programs to generate viewership and advertising revenue. Notably, the evidence was that EPI does not provide Discovery with its most popular programs. The respondents dispute the union's assertion that *Daily Planet* is Discovery's "flagship production" and maintain it is "Forensic Factor". The evidence was that *Daily Planet* is not among Discovery's 50 highest-rated programs, subject to some content being aired in "Discovery Presents,"nor is it aired in the most widely-viewed times. Discovery's top-rated programs, such as *Canada's Worst Driver* and *Canada's Worst Handyman,*

are not produced by EPI. These are provided by Proper TV. In that sense, Discovery is more dependent on the other companies' productions than on EPI's, for its overall success and profitability.

[131] Regardless of the exact percentage of Canadian content Discovery licenses from EPI, it is noted that Discovery is not dependent on EPI for its overall Canadian content as it obtains over two thirds from numerous Canadian producers. Therefore, in evaluating the importance of EPI's work for Discovery, it is evident that the Canadian content Discovery licenses from EPI could be licensed from other Canadian producers.

[132] With respect to Discovery's CPE requirements, the evidence indicates that, during the 2007 fiscal year, EPI received approximately 74% of its revenue from sales to Discovery, which allowed Discovery to fulfill approximately 57% of its CPE requirement. Thus, Discovery expended approximately 43% of its CPE requirement with other Canadian producers. Further, there was no evidence indicating that Discovery could not expend additional CPE funds with the over 20 other Canadian producers it has used in the past. Therefore, the Board is not persuaded that Discovery is dependent on EPI to fulfill the CPE requirements of its CRTC licence.

[133] The situation is similar to that in *AGT Directory*. In that case, AGT Directory Ltd. (AGT Directory) was a wholly-owned subsidiary of AGT Limited (a subsidiary of Telus), a federal undertaking. Its operations involved the publication of telephone directories for subscribers of AGT Limited, and operation of an audio directory service (the "Talking Yellow Pages") for users of the telephone network. The Board found that AGT Directory's labour relations remained under provincial jurisdiction. There was little functional integration between the operations of AGT Directory and the core telecommunications operations of AGT Limited. AGT Directory's services were not indispensable to the federal undertaking, nor would AGT Limited's operations be "severely disadvantaged" if AGT Directory's services were not available. Notably, AGT Directory was found to be a separate undertaking despite many of AGT Directory's employees having formerly performed the same job for AGT Limited, and sharing the same building, though in a separate space. It was found to have separate management and administration, although it had two directors from AGT Limited, one of whom was the parent's president. AGT Limited was also AGT Directory's largest

single client. It was held that a corporate relationship and/or corporate ownership was not sufficient to alter jurisdiction, as the federal undertaking was not dependent on AGT Directory and it could contract with another company for the product.

[134] In the Board's view, EPI's situation is similar to that in *AGT Directory*, as EPI simply provides a product to Discovery. Discovery is not dependent upon it, as it can use another Canadian producer to provide the product. It can also find other means of satisfying its CPE requirements. Discovery will not be "severely disadvantaged' if EPI were to cease its operations.

[135] Also in accordance with *AGT Directory*, the corporate and commercial relationship between EPI and Discovery should not be relied upon to alter jurisdiction where there is insufficient functional and operational integration and the services of the EPI are not indispensable to Discovery. As the Alberta Labour Relations Board stated in *AGT Directory*:

> ...Although AGT Limited purchases the services of AGT Directory, there is little functional integration between the operations and services of AGT Directory and AGT Limited. As the Court stated in Ex Parte Dunn, supra, a subsidiary is not vital, essential or integral simply because a product produced by a subsidiary company is purchased by the parent. As in that case, the product here could easily be purchased from other companies either locally or nationally.
>
> ...
>
> ...In the case at hand, there is little, if any, contact or integration of employees of AGT Limited and AGT Directory. Indeed, if the services performed by AGT Directory's employees were withdrawn, AGT Limited would feel little impact other than an increase in the use of its directory assistance service and a sharp rise in customer dissatisfaction due to inconvenience. In this sense, the business operations of AGT Limited would be affected somewhat, but not the technological operation of directing a call. However, the effective performance of the core federal undertaking is far from dependent upon the services offered by AGT Directory.
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> (pages 314; and 230)

[136] Similarly, if EPI were to cease its production operations, Discovery's business may be impacted somewhat, but not in the technological operation of its broadcasting function, and its broadcasting operations would not be prevented from continuing.

[137] For all of these reasons, the Board finds that the evidence lacks a basis for it to conclude that EPI's operations are vital, essential or integral to Discovery and that its labour relations fall within federal jurisdiction as a result. It dismisses the union's arguments in this regard.

V–Conclusion

[138] Having fully analysed the evidence and submissions of the parties, for all of the reasons cited above, the Board does not find an evidentiary foundation to depart from the general rule that labour relations are regulated by the province and therefore dismisses the application for certification and related files on the basis that it does not have the requisite jurisdiction to entertain the applications.

[139] This is a unanimous decision of the Board.

Judith F. MacPherson, Q.C.
Vice-Chairperson

Norman Rivard
Member

Patrick Heinke
Member